



(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 232 and 252

RIN 0750-AI02

Defense Federal Acquisition Regulation Supplement: Clauses with Alternates—Contract Financing (DFARS Case 2013-D014)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to create an overarching prescription for the set of contract financing related clauses with one or more alternates. The rule also proposes to add a separate prescription for the basic clause as well as the alternate. In addition, the proposed rule would include the full text of the clause alternate.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2013-D014, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit

comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D014" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D014." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D014" on your attached document.

- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D014 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Annette Gray, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Annette Gray, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6093; facsimile 571-372-6101.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to create an overarching prescription for the contract financing clause with one alternate. The rule also proposes to add a separate prescription for the basic clause as well as the alternate. For clarity, the preface of the alternate will continue to explain what portions of the alternate are different from the basic clause.

Separate prescriptions for the basic and alternates of DFARS clauses will facilitate the use of automated contract writing systems. The proposed rule will not revise the prescriptions in any substantive way or change the applicability of the clause or its alternate.

The inclusion of the full text of each clause alternate aims to make the terms of a clause alternate clearer to offerors and to DoD contracting officers. The current convention for alternates is to show only the changed paragraphs from the basic provision or clause. This proposed rule would include the full text of each clause and each alternate, which will assist in making solicitation and contract terms and conditions easier to read and understand. By placing alternates in full text, all paragraph substitutions from the basic clause will have already been made. Inapplicable paragraphs from the basic clause that

are superseded by the alternate will not be included in the solicitation or contract in order to prevent confusion.

Although this rule proposes to include the text of the alternate in full, it retains the language that precedes the clause or alternate, which includes the location of the alternate's prescription and a statement that identifies which paragraphs were changed from the basic clause. Further, alternates are proposed to have individual titles that tie them to the basic clause, e.g., "Limitation of Government's Obligation-Alternate I" in lieu of "Alternate I."

II. Discussion

This proposed rule addresses only the single DFARS part 232 clause that has an alternate. The remaining prescriptions in part 232 are not proposed to be changed in any way by this rule. The affected clause is 252.232-7007, Limitation of Government's Obligation, with one alternate. The naming convention results in proposed new clause titles, e.g., Limitation of Government's Obligation-Basic and Limitation of Government's Obligation - Alternate I.

An umbrella prescription is proposed to be added for the elements common to the basic clause and alternate. The specific prescription for the basic clause and alternate would then address only the requirements for their use that enable the selection of the basic or the alternate. For example, the

revised prescription for Limitation of Government's Obligation—Alternate I would read as follows: "Use the clause at [252.232-7007](#), Limitation of Government's Obligation—Alternate I, if only one line item will be incrementally funded." The planned changes will increase the clarity and ease of use, but will not revise the applicability in any way. The text of the current DFARS 252.232-7007, Alternate I, would no longer consist solely of paragraph (a), but would include the entire text of DFARS 252.232-7007 (basic clause) with the revised paragraph (a) substituted for the corresponding paragraph of the basic clause. Inapplicable paragraphs from the basic version of the clause that are superseded by the alternate will not be included in the solicitation or contract in order to prevent confusion.

Further, this proposed rule would also revise the applicable preface, i.e., the language in part 232 that precedes a provision, clause, or alternate. The proposed rule would replace the current preface language with a statement that identifies the specific changes from the basic version of the solicitations provision or clause.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including

potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it merely revises the prescriptions for solicitation provisions and clauses with alternates to be unique, as well as includes the full text of each provision or clause in each alternate. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The purpose of this proposed rule is to amend the DFARS to create unique prescriptions for the basic version and each alternate of DFARS part 232 solicitation provisions and contract clauses, and to include the full text of each clause alternate.

The use of automated contract writing systems will be facilitated by having unique prescriptions for the basic version and each alternate of DFARS solicitations provisions and clauses. The current convention requires the prescription for the basic provision or clause to address all the possibilities covered by the alternates, and then the prescription for each alternate addresses only what is different for the use of that particular alternate. This rule will revise the prescriptions so that the basic solicitation provision or clause and each alternate is unique and stands on its own. The prescriptions will not be revised in any way to change when they are applicable to offerors, contractors, or subcontractors.

Additionally, the inclusion of the full text of each provision or clause alternate aims to make the terms of a provision or clause alternate clearer to offerors, as well as to DoD contracting officers. Instead of the current convention for alternates to show only paragraphs changed from the basic version of the provision or clause, this rule proposes to include the full text of each version of the clause. This will assist in making the terms of the clause clearer, because all paragraph substitutions will have already been made. Inapplicable paragraphs from the basic version of the clause that are superseded by the alternate are not included in the solicitation or contract to prevent confusion.

Potential offerors, including small businesses, may be affected by this rule by seeing an unfamiliar format for clause alternates in solicitations and contracts issued by DoD contracting activities. An average of 12,618,521 new contracts was awarded in Fiscal Years 2011 and 2012, and an average of 1,557,852 of these actions (12.35%) was awarded to small businesses. It is unknown how many of these contracts were awarded that included an alternate to a DFARS provision or clause. Nothing substantive will change in solicitations or contracts for potential offerors, and only the appearance of how clause alternates are presented in the solicitations and contracts will be changed.

This rule may result in potential offerors, including small businesses, expending more time to become familiar with and to understand the new format of the clause alternates in full text contained in contracts issued by any DoD contracting activity. The rule also anticipates saving contractors time by making all paragraph substitutions from the basic version of the clause, and not requiring the contractors to read inapplicable paragraphs contained in the basic version of the clause where alternates are also included in the solicitations and contracts. The overall burden caused by this rule is expected to be negligible and will not be any greater on small businesses than it is on large businesses.

This rule does not add any new information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. No alternatives were identified that will accomplish the objectives of the rule.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D014), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 232 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System

Therefore, 48 CFR parts 232 and 252 are proposed to be amended as follows:

1. The authority citation for parts 232 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR Chapter 1.

PART 232—CONTRACT FINANCING

232.704-70 [Amended]

2. Amend section 232.704-70 by—

a. In paragraph (a), removing "Limitation of Government's Obligation, the contracting officer" and adding "Limitation of Government's Obligation--Basic or Limitation of Government's Obligation--Alternate I, the contracting officer" in its place.

b. In paragraph (c), removing "Limitation of Government's Obligation, sufficient funds" and adding "Limitation of Government's Obligation--Basic or Limitation of Government's Obligation--Alternate I, sufficient funds" in its place.

3. Revise section 232.705-70 to read as follows:

232.705-70 Clause for limitation of Government's obligation.

Use the basic or the alternate of the clause at 252.232-7007, Limitation of Government's Obligation, in solicitations and resultant incrementally funded fixed-price contracts. The contracting officer may revise the contractor's notification period, in paragraph (c) of the clause, from "ninety" to "thirty" or "sixty" days, as appropriate.

(a) Use the clause Limitation of Government's Obligation--Basic, if more than one line item will be incrementally funded.

(b) Use the clause Limitation of Government's Obligation--Alternate I, if only one line item will be incrementally funded.

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Revise section 252.232-7007 to read as follows:

252.232-7007 Limitation of Government's Obligation.

As prescribed in [232.705-70](#), use **one of** the following clauses:

(a) *Limitation of Government's Obligation--Basic.* For the specific prescription for the use of the basic clause, see 232.705-70(a).

LIMITATION OF GOVERNMENT'S OBLIGATION--BASIC (DATE).

(a) Contract line item(s) ____*____ through ____*____ are incrementally funded. For these item(s), the sum of \$ ____*____ of the total price is presently available for payment and allotted to this contract. An allotment schedule is set forth in paragraph (j) of this clause.

(b) For item(s) identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including reimbursement in the event of termination of those item(s) for the Government's convenience, approximates the total amount currently allotted to the contract. The Contractor is not

authorized to continue work on those item(s) beyond that point. The Government will not be obligated in any event to reimburse the Contractor in excess of the amount allotted to the contract for those item(s) regardless of anything to the contrary in the clause entitled "Termination for Convenience of the Government." As used in this clause, the total amount payable by the Government in the event of termination of applicable contract line item(s) for convenience includes costs, profit, and estimated termination settlement costs for those item(s).

(c) Notwithstanding the dates specified in the allotment schedule in paragraph (j) of this clause, the Contractor will notify the Contracting Officer in writing at least ninety days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the applicable item(s). The notification will state (1) the estimated date when that point will be reached and (2) an estimate of additional funding, if any, needed to continue performance of applicable line items up to the next scheduled date for allotment of funds identified in paragraph (j) of this clause, or to a mutually agreed upon substitute date. The notification will also advise the Contracting Officer of the estimated amount

of additional funds that will be required for the timely performance of the item(s) funded pursuant to this clause, for a subsequent period as may be specified in the allotment schedule in paragraph (j) of this clause or otherwise agreed to by the parties. If after such notification additional funds are not allotted by the date identified in the Contractor's notification, or by an agreed substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the clause of this contract entitled "Termination for Convenience of the Government."

(d) When additional funds are allotted for continued performance of the contract line item(s) identified in paragraph (a) of this clause, the parties will agree as to the period of contract performance which will be covered by the funds. The provisions of paragraphs (b) through (d) of this clause will apply in like manner to the additional allotted funds and agreed substitute date, and the contract will be modified accordingly.

(e) If, solely by reason of failure of the Government to allot additional funds, by the dates indicated below, in amounts sufficient for timely performance of the contract line item(s) identified in paragraph (a) of this clause, the Contractor incurs additional costs or is delayed in the performance of the work under this contract and if additional funds are allotted, an equitable adjustment will be made in the price or prices

(including appropriate target, billing, and ceiling prices where applicable) of the item(s), or in the time of delivery, or both. Failure to agree to any such equitable adjustment hereunder will be a dispute concerning a question of fact within the meaning of the clause entitled "Disputes."

(f) The Government may at any time prior to termination allot additional funds for the performance of the contract line item(s) identified in paragraph (a) of this clause.

(g) The termination provisions of this clause do not limit the rights of the Government under the clause entitled "Default." The provisions of this clause are limited to the work and allotment of funds for the contract line item(s) set forth in paragraph (a) of this clause. This clause no longer applies once the contract is fully funded except with regard to the rights or obligations of the parties concerning equitable adjustments negotiated under paragraphs (d) and (e) of this clause.

(h) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the clause of this contract entitled "Termination for Convenience of the Government."

(i) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(j) The parties contemplate that the Government will allot funds to this contract in accordance with the following schedule:

On execution of contract	\$_____
month) (day), (year)	\$_____
(month) (day), (year)	\$_____
(month) (day), (year)	\$_____

(End of clause)

(b) *Limitation of Government's Obligation-Alternate I.* For the specific prescription for the use of Alternate I, see 232.705-70(b). Alternate I uses a different paragraph (a) than the basic clause.

LIMITATION OF GOVERNMENT'S OBLIGATION--ALTERNATE I (DATE).

(a) Contract line item _____ is incrementally funded. The sum of \$_____ * _____ is presently available for payment and allotted to this contract. An allotment schedule is contained in paragraph (j) of this clause.

(b) For item(s) identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including reimbursement in the event of termination of those item(s) for the Government's convenience, approximates the total amount currently allotted to the contract. The Contractor is not authorized to continue work on those item(s) beyond that point.

The Government will not be obligated in any event to reimburse the Contractor in excess of the amount allotted to the contract for those item(s) regardless of anything to the contrary in the clause entitled "Termination for Convenience of the Government." As used in this clause, the total amount payable by the Government in the event of termination of applicable contract line item(s) for convenience includes costs, profit, and estimated termination settlement costs for those item(s).

(c) Notwithstanding the dates specified in the allotment schedule in paragraph (j) of this clause, the Contractor will notify the Contracting Officer in writing at least ninety days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the applicable item(s). The notification will state the estimated date when that point will be reached and an estimate of additional funding, if any, needed to continue performance of applicable line items up to the next scheduled date for allotment of funds identified in paragraph (j) of this clause, or to a mutually agreed upon substitute date. The notification will also advise the Contracting Officer of the estimated amount of additional funds that will be required for the timely performance of the

item(s) funded pursuant to this clause, for a subsequent period as may be specified in the allotment schedule in paragraph (j) of this clause or otherwise agreed to by the parties. If after such notification additional funds are not allotted by the date identified in the Contractor's notification, or by an agreed substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the clause of this contract entitled "Termination for Convenience of the Government."

(d) When additional funds are allotted for continued performance of the contract line item(s) identified in paragraph (a) of this clause, the parties will agree as to the period of contract performance which will be covered by the funds. The provisions of paragraphs (b) through (d) of this clause will apply in like manner to the additional allotted funds and agreed substitute date, and the contract will be modified accordingly.

(e) If, solely by reason of failure of the Government to allot additional funds, by the dates indicated below, in amounts sufficient for timely performance of the contract line item(s) identified in paragraph (a) of this clause, the Contractor incurs additional costs or is delayed in the performance of the work under this contract and if additional funds are allotted, an equitable adjustment will be made in the price or prices (including appropriate target, billing, and ceiling prices where

applicable) of the item(s), or in the time of delivery, or both. Failure to agree to any such equitable adjustment hereunder will be a dispute concerning a question of fact within the meaning of the clause entitled "Disputes."

(f) The Government may at any time prior to termination allot additional funds for the performance of the contract line item(s) identified in paragraph (a) of this clause.

(g) The termination provisions of this clause do not limit the rights of the Government under the clause entitled "Default." The provisions of this clause are limited to the work and allotment of funds for the contract line item(s) set forth in paragraph (a) of this clause. This clause no longer applies once the contract is fully funded except with regard to the rights or obligations of the parties concerning equitable adjustments negotiated under paragraphs (d) and (e) of this clause.

(h) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the clause of this contract entitled "Termination for Convenience of the Government."

(i) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(j) The parties contemplate that the Government will allot funds to this contract in accordance with the following schedule:

On execution of contract	\$ _____
(month) (day), (year)	\$ _____
(month) (day), (year)	\$ _____
(month) (day), (year)	\$ _____

(End of clause)

* To be inserted after negotiation.

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